Supreme Court, U.S.
FILED
02 708 NOV 05 2002
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No. 02-

IN THE
Supreme Court of the United States

RAVIDATH RAGBIR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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96 pp

QUESTIONS PRESENTED

1. Whether Petitioner's alleged confession to Detective Mignone was voluntary in the face of the conflicting testimony of the law enforcement authorities and another witnesses regarding how the statement took place?

2. Whether the jury instruction of the District Court was a cure to any potential prejudice to the Petitioner after the District Court denied Petitioner's motion for a new trial following the co-defendant's plea of guilty during the trial?

3. Whether the evidence of the non-indicted fraudulent loans was properly excluded from Petitioner's trial pursuant to the Federal Rules of Evidence, Rule 403?

4. Whether Petitioner's motion for an acquittal or a new trial was improperly denied in the face of the verdict of the jury which was against the weight of the evidence?

5. Whether the testimony addressing the total face value of the fraudulent loans (equaling $1.5 million dollars) unduly prejudiced the jury when the proof of actual loss was only $400,000.00?

6. Whether the District Court erred in concluding the Petitioner's actions involved more than "minimal planning" as well as the Petitioner holding a "position of trust" thereby enhancing the sentence?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices vii

Opinions Below 1

Statement of Jurisdiction 1

Statement of the Case 1

Reasons for Granting the Petition 2

I. Petitioner's Statement To Detective Mignone Was Not Voluntary Under The Relevant Case Law And The Third Circuit's Refusal To Overturn The District's Court Admission Of The Statement Is Divergent From Other Decisions Of the Federal Court. 2

II. The Jury Instruction Provided By The District Court Following The Guilty Plea Of Petitioner's Co-Defendant Failed To Cure The Substantial Prejudice To Petitioner. ... 4

III. The Evidence Of The Fraudulent Loans Should Have Been Excluded Under The Federal Rules Of Evidence, Rule 403 As Being Unduly Prejudicial. 6

Contents

Page

IV. The Third Circuit Erred In Not Reversing The District Court's Denial Of Petitioner's Motion For A New Trial Or Acquittal. 9

V. The Prejudicial Impact Of The References To The Total Face Value Of The Fraudulent Loans Equaling $1.5 Million Dollars Highly Outweighed Any Probative Value Were The Actual Loss To The Company Was $400,000.00. 10

VI. The Third Circuit Incorrectly Dismissed Petitioner's Challenge To The Enhancement Of His Sentencing Under the Federal Sentencing Guidelines, U.S.S.G. § 2FI.I(b)(2)(A) For More Than Minimal Planning And U.S.S.G. § 3B1.3 For Violating A Position Of Trust. 11

Conclusion 15

TABLE OF CITED AUTHORITIES

Page

Cases:

Miller v. Fenton, 796 F.2d 598 (3d 1986) 3

Miller v. Fenton, 474 U.S. 104 (1985) 3

United States v. Aguilar, 843 F.2d 155 (3d Cir. 1988) 9

United States v. Barrientos, 758 F.2d 1152 (7th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986) 4, 5

United States v. Beattie, 594 F.2d 1327 (9th Cir. 1979) 10, 11

United States v. Bethancourt, 65 F.3d 1074 (3d Cir. 1995), *cert. denied*, 516 U.S. 1153 (1996) 2, 3

United States v. Brown, 147 F.3d 477 (6th Cir. 1998), *cert. denied*, 525 U.S. 918 (1998) 8, 9

United States v. Chapman, 241 F.3d 57 (1st Cir. 2001) 14

United Stated v. Craddock, 993 F.2d 338 (3d Cir. 1993) 11, 12

United States v. Delucca, 630 F.2d 294 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981) 6

Cited Authorities

Page

United States v. Georgiadis, 933 F.2d 1219 (3d Cir. 1991) 12

United States v. Gregorio, 956 F.2d 341 (1st Cir. 1992) 15

United States v. Iannone, 184 F.3d 214 (3d Cir. 1999) 13, 14

United States v. McGlory, 968 F.2d 309 (3d Cir. 1992) 8

United States v. Murray, 103 F.3d 310 (3d Cir. 1997), *cert. denied*, 525 U.S. 911 (1998) 8

United States v. Pardo, 25 F.3d 1187 (3d Cir. 1994) 13

United States v. Phillips, 640 F.2d 87 (7th Cir. 1981) 4, 5

United States v. Rust, 976 F.2d 55 (1st Cir. 1992) ... 15

United Stated v. Schwartz, 790 F.2d 1059 (3d Cir. 1986) 7, 8

United States v. Swint, 15 F.3d 286 (3d Cir. 1994) 3

United States ex rel. Hayward v. Johnson, 508 F.2d 322 (3d Cir. 1975) 3

Cited Authorities

Page

Rules:

Federal Rule of Evidence, Rule 403 ..... i, 6, 7, 8

Federal Rule of Evidence, Rule 404(b) 8

Other Authorities:

United States Sentencing Guideline
sec. 1B1.3 14

United States Sentencing Guideline
sec. 3B1.3 ..... 11, 14

United States Sentencing Guideline
sec. 2Fl.I(b)(2)(A) 11

TABLE OF APPENDICES

Page

Appendix A — Opinion And Judgment Of The United States Court Of Appeals For The Third Circuit Dated And Filed June 7, 2002 ..... 1a

Appendix B — Memorandum Opinion And Order And Judgment Of The United States District Court For The District Of New Jersey Dated And Filed September 12, 2001 ..... 15a

Appendix C — Opinion And Order Of The United States District Court For The District Of New Jersey Dated And Filed March 1, 2001 ..... 33a

Appendix D — Memorandum Opinion And Order Of The United States District Court For The District Of New Jersey Dated October 24, 2000 .. 45a

OPINIONS BELOW

The District Court's Memorandum Opinion and Order dated October 24, 2000 (per Bassler, D.J.) denying all pre-trial motions but granting Petitioner's motion for a suppression hearing and to serve subpoenas. (Appendix 40a) The District Court's Opinion Court and Order dated March 1, 2001 (per Bassler, D.J.) denying Petitioner's motion for a new trial. (Appendix 27a) The District Court's Memorandum Opinion and Order dated September 12, 2001 memorializing the sentencing enhancements for "more than minimal planning" and "violation of public trust." (Appendix 20a) The Opinion and Judgment of the Third Circuit Court of Appeals dated June 7, 2002 (per Nygaard, Barry and Magill, JJ) (Appendix 1a)

STATEMENT OF JURISDICTION

The Court of Appeals for the Third Circuit entered its Opinion and Judgment on June 7, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

As a result of the United States District Court's failure to recognize and apply customary tests and exceptions, compounded by the United States Court of Appeals for the Third Circuit failing to apply the applicable standard of review to each issue, Petitioner is subjected to thirty (30) months of incarceration.

REASONS FOR GRANTING THE PETITION

I. Petitioner's Statement To Detective Mignone Was Not Voluntary Under The Relevant Case Law And The Third Circuit's Refusal To Overturn The District's Court Admission Of The Statement Is Divergent From Other Decisions Of the Federal Court.

Petitioner's statement to Detective Mignone cannot be considered voluntary. On its face, the explanation of Detective Mignone is incredible. App. 3a. The District Court accepted as fact and the Third Circuit affirmed that Detective Mignone questioned Petitioner while a secretary typed at the desk next to them. Both Courts ignored the factual impracticability of Detective Mignone's testimony, that being the secretary typed a lengthy statement in only fifteen minutes while Petitioner recited answers that involved specific dollar figures and complicated names. Purportedly, the secretary did not ask how to spell any of these names and the statement needed no corrections. Petitioner was questioned at the police station for about seven hours; it is unbelievable that the preparation of the statement took merely fifteen minutes.

In *United States v. Bethancourt*, 65 F.3d 1074, 1078 (3d Cir. 1995), *cert. denied*, 516 U.S. 1153 (1996), the defendant alleged he was interrogated for approximately six hours. He was thereafter contradicted by police detectives who testified the defendant confessed after about two hours of interrogation but the typing and preparation of his statement took several hours. This explanation was given to account for the total six hours the defendant was detained. It was noted by the Circuit Court that the defendant in *Bethancourt*, *supra*, assisted in correcting and drafting his confession. *Id.* at 1078. Despite the Court being provided

with a realistic version of a six hour interrogation in *Bethancourt*, *supra*, in the case at hand, the Third Circuit does not question the District Court's finding that Det. Mignone's testimony is wholly accurate.

In *United States v. Swint*, 15 F.3d 286 (3d Cir. 1994) the Third Circuit applies the test set forth in *United States ex rel. Hayward v. Johnson*, 508 F.2d 322 (3d Cir. 1975) to determine whether a confession is voluntary. The Court must determine whether the confession was "the product of an essentially free and unconstrained choice by its maker, that it was the product of a rational intellect and a free will and that the appellant's will was not overborne." *Swint*, 15 F.3d at 289. In applying those principles to Petitioner's confession, the conclusion has to be drawn that the lengthy three page statement filled with names and exact dollar figures was not of Petitioner's free will and unconstrained choice and that the vast amount of information was already known by the inquisitor.

In *Miller v. Fenton*, 796 F.2d 598 (3d 1986) the Third Circuit performed an extensive evaluation of the voluntariness of the defendant's confession after remand from the United States Supreme Court on that issue in *Miller v. Fenton*, 474 U.S. 104 (1985). The Third Circuit therein provided that it must review the "totality of the circumstances" in deciding whether a confession was voluntary. 796 F.2d at 605. The Court explained:

> A totality of the circumstances inquiry defies strictly analytic treatment. We cannot reach a conclusion simply by scrutinizing each circumstances

> separately, for the concept underlying the phrase "totality of the circumstances" is that the whole is somehow distinct from the sum of its parts.

Ibid. Throughout the history of Petitioner's case, there is no reasonable explanation provided by the Government to satisfy the argument that the story of Det. Mignone smacks in the face of reason. The District Court ignored these factors at the suppression hearing and the Third Circuit did not provide the required analysis. There was no inquiry into the totality of the circumstances as was required and as has been performed on previous occasions by the Third Circuit.

II. The Jury Instruction Provided By The District Court Following The Guilty Plea Of Petitioner's Co-Defendant Failed To Cure The Substantial Prejudice To Petitioner.

The Third Circuit erred in not reversing the decision of the District Court in denying Petitioner's motion for a new trial following the guilty plea of Mr. Kosch. As a result of the substantial prejudice to Petitioner, the Third Circuit could not cure this prejudice through an instruction and accordingly, the only remedy would be remanding for a new trial. The Government received the benefit of evidence and testimony that related to Mr. Kosch's actions and the advantage of tying the actions of both actors together in opening statements and all witness leading up to the plea of Mr. Kosch.

In *United States v. Barrientos*, 758 F.2d 1152 (7th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986), the Seventh Circuit set forth the instruction given by the District Court Judge in *United States v. Phillips*, 640 F.2d 87 (7th Cir. 1981) to address the circumstance of one defendant pleading

guilty during a trial. In comparing the instruction with the instruction of the District Court Judge in Petitioner (App. 4a) the following important language is missing:

> The reason for this even when defendants are tried jointly, the jury is called upon to determine the guilt or innocence of each defendant separately and the jury will be called upon, even if they are joint defendants, to consider the evidence separately as to one defendant and then as to the next defendant. *And that the purpose of a joint trial is not to implicate one defendants with the other, it's just a matter of convenience. It amounts to saving court time.*

(Emphasis added.) *Barrientos*, 758 F.2d at 1156. From a review of the instructions given by the District Court Judge, there is no language contained therein that would provide an explanation to the jury of why these co-defendants are being tried together, for court expediency, not to establish a common bond of guilt or innocence. The instruction given by the District Court in Petitioner meets the purpose of *Phillips* instruction, to advise there is a co-defendant missing, not to provide a reason for his departure, and to inform the jury they are not to consider why he is missing and not to hold it against the remaining defendant. However, where the actions of the two defendants were so closely related, the extra language of judicial economy should have been included in the instruction to assure that had the defendant remained the jury would have conducted separate deliberations. If the jury inferred Mr. Kosch plead guilty, there existed an excessive prejudice against Petitioner.

The Fifth Circuit Court of Appeals in *United States v. Delucca*, 630 F.2d 294, 298 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981), recognized that:

> . . . the problem of a defendant's guilt by association arises primarily when the jury learns of a co-defendant's guilty plea entered either before or during the trial proceedings.

Given the participation of Kosch and his attorney taking an active role in the trial, can lead a jury to infer that Mr. Kosch entered a plea of guilt, despite any instructions by a District Judge.

III. The Evidence Of The Fraudulent Loans Should Have Been Excluded Under The Federal Rules Of Evidence, Rule 403 As Being Unduly Prejudicial.

The three loan applications of Colon, Jurschen and Liaci, should have been excluded by the District Court as these Petitioner had no personal contact with these individuals. Their association with the application process was with another individual. Allowing this testimony at the trial of Petitioner was unduly prejudicial and outweighed any probative value that the District Court construed permitted its admissibility.

As pointed out in its Opinion, the Third Circuit comments that the District Court characterized these three loan applications as "standard bread and butter" evidence. (App. 5a) This is insufficient. This evidence would have been appropriately admitted as to Kosch, not, however as to Petitioner. A catch-all exception is inadequate to satisfy the stringent balancing test required by Rule 403.

In *United Stated v. Schwartz*, 790 F.2d 1059 (3d Cir. 1986) the Third Circuit reversed the decision of the District Court to allow testimony of a prior cocaine sale as overly prejudicial.

> At no point — during the lengthy arguments over admissibility of the evidence in the course of the trial, or in the court's rulings, or in the charge to the jury, or even in the government's briefs on appeal — can there be found anything more specific than a reference to the entire laundry-list of possible exceptions to the general rule excluding such evidence.

Schwartz, 790 F.2d at 1061. The Court in *Schwartz*, *supra*, further stated "the presence or absence of a genuine need for the questioned evidence is a legitimate part of the balancing analysis required by Federal Rule of Evidence 403." *Id.* at 1061. As seen in *Schwartz*, *supra*, the Third Circuit did not allow the "standard bread and butter" argument to stand. The Third Circuit made it clear in its Opinion that it did not permit the proverbial "everything but the kitchen sink" argument to a Rule 403 challenge.

> The Government's repeated assertions that the evidence was admissible to prove all of the matters covered by the listed exceptions, and (unspecified) other legitimate purposes as well, seemingly strengthens that argument.

790 F.2d at 1062. The Third Circuit in *Schwartz*, *supra*, examines Federal Rule of Evidence 403 which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by

> the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In *Schwartz*, *supra*, following an examination of Rule 403 and performing the required balancing test between Rule 403 and 404(b) the Circuit Court concluded the District Court abused its discretion in allowing the prejudicial evidence and remanded.

In *United States v. McGlory*, 968 F.2d 309, 393 (3d Cir. 1992) only after first performing the balancing test required under Rule 403, did the Third Circuit hold that the evidence sought to be excluded would be allowed under 404(b) because the Government had articulated a specific purpose for the use of the testimony that was probative of the defendant participation in a heroin conspiracy.

In *United States v. Murray*, 103 F.3d 310, 316-317 (3d Cir. 1997), *cert. denied*, 525 U.S. 911 (1998), the Third Circuit reversed a murder conviction, when the Government did not specify the clear basis for allowing otherwise excludable and prejudicial testimony into evidence under 404(b). Clearly, an explanation that it was standard "bread and butter type evidence" did not suffice.

In *United States v. Brown*, 147 F.3d 477 (6th Cir. 1998), *cert. denied*, 525 U.S. 918 (1998) the Circuit Court sets forth its analysis to identify whether there was an abuse of discretion by the District Court in admitting evidence claimed to be prejudicial. The Sixth Circuit considered the following:

> (1) whether the other act evidence was unduly prejudicial; the availability of other means of

> proof; (3) when the other acts occurred; and (4) whether the district court gave a limiting instruction.

Brown, 147 F.3d at 483. In applying those same standards to the case at hand the Third Circuit should have found that the admission of the other loan applications were unduly prejudicial. They were not relevant to Petitioner's case and therefore there would be no other required means of proof. The timing of the loan applications is not of consequence as the loan applications are not relevant to Petitioner. There was no limiting instruction provided. Accordingly, the loan applications should have been excluded.

IV. The Third Circuit Erred In Not Reversing The District Court's Denial Of Petitioner's Motion For A New Trial Or Acquittal.

Following this trial, there was insufficient evidence to sustain a finding of guilt against Petitioner. On the contrary, the evidence demonstrated that Petitioner did not recruit any individuals to come to his company and apply for a fraudulent loan. He did not secure false documentation for these individuals. The Third Circuit in its Opinion relies heavily on Petitioner's alleged confession. (App. 6a) The other testimony cited by the Court of Appeals in its Opinion is that of the coconspirators whose testimony again, like Petitioner's confession, should have both been properly excluded. (App. 7a)

In *United States v. Aguilar*, 843 F.2d 155, 157 (3d Cir. 1988) the Third Circuit reviewed a motion for a new trial and recognized the standard for review is as follows:

> . . . the relevant question is whether, after viewing the evidence in the light most favorable to the

> prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

At Petitioner's trial, the admission of loan applications established a direct connection between the three individuals and Kosch; not Petitioner. Other than the improperly admitted statement, the record is devoid of any conclusive proof that Petitioncr had knowledge of the conspiracy. The fact that an account executive at HFC cannot issue loan applications and that this task is left only to an underwriter who reviews the information provided by Petitioner, escapes notice and mention of both the District Court and the Third Circuit as relevant.

V. The Prejudicial Impact Of The References To The Total Face Value Of The Fraudulent Loans Equaling $1.5 Million Dollars Highly Outweighed Any Probative Value Were The Actual Loss To The Company Was $400,000.00.

In its Opinion, the Third Circuit distinguished *United States v. Beattie* 594 F.2d 1327 (9th Cir. 1979) from the within matter by stating that the Government did not attempt to show the loss of HFC was $1.5 million dollars. (App. 9a) The Court of Appeal's characterization that the Government did not reference a $1.5 million dollar loss to HFC is disingenuous. The Government received the benefit of the jury hearing the total face value of the loans and interpreting the loss to HFC and/or the amount of fraud equaling $1.5 million dollars. This is so prejudicial that its admission constitutes reversible error. The total of the face values of the loans was irrelevant merely the actual loss to HFC would be relevant to the jury.

In this matter, as in *Beattie*, *supra*, there was an inflated amount of loss presented to the jury. "It is impossible to regard the admission of testimony concerning this substantial amount of loss to the bank as harmless error." *Beattie*, 594 F.2d at 1330. It is immaterial that the reference to the $1.5 million dollar face value of the loans was contained only in Petitioner's statements. The potential prejudice far outweighs the probative value. The references to the total face values of the loans could have properly been excluded from the statements prior to allowing same into evidence.

VI. The Third Circuit Incorrectly Dismissed Petitioner's Challenge To The Enhancement Of His Sentencing Under the Federal Sentencing Guidelines, U.S.S.G. § 2FI.I(b)(2)(A) For More Than Minimal Planning And U.S.S.G. § 3B1.3 For Violating A Position Of Trust.

To support its denial of Petitioner's argument that he did not occupy a position of trust, the Third Circuit relies heavily on *United Stated v. Craddock*, 993 F.2d 338 (3d Cir. 1993). The analysis in *Craddock*, supra, was far more critical than the simplistic statement set forth by the Third Circuit in its Opinion in Petitioner. (App. 10a) In *Craddock*, *supra*, the Court sets forth the standard used in determining whether an individual such as a bank teller, occupies a position of trust.

In *Craddock*, *supra*, the Court delineated that the defendant was not an ordinary bank teller. That since that defendant's:

> . . . employer had given him the authority to verify the identity of those requesting payouts.

> The payouts made to his various accomplices were not detectable by way of the routine auditing and surveillance that would normally detect simple embezzlement; indeed, all the fraudulent transactions appeared to be legitimate from the perspective of the Financial Exchange and Western Union.

Id. at 343. Petitioner was the first in line to get a loan approval process started. An underwriter would retrieve an application from the company's dedicated computer line, verify the information therein and all title searches and the like were performed by outside agencies for HFC. Petitioner did not occupy the position of trust to the extent of the defendant in *Craddock*, *supra*.

Moreover, in *United States v. Georgiadis*, 933 F.2d 1219, 1225 (3d Cir. 1991) the Third Circuit provided that when examining whether an abuse of trust existed:

> . . . the position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons.

Petitioner did not have that nexus between his position at the bank and HFC to have established the required trust with his company. He was merely the first of many hands on each application. In *Georgiadis*, *supra*, the defendant was the Assistant Vice President in the Mortgage Department who administered the Bank's mortgage settlement closings.

In its Opinion in *United States v. Ragbir*, the Third Circuit examines the three-prong test established in *United States v. Pardo*, 25 F.3d 1187, 1192 (3d Cir. 1994):

> (1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in defendant vis-a-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position."

The Third Circuit then incorrectly reasons that since Petitioner was the individual that completed the application (merely by entering date into fields on a computer form): and received verifying documents requested from and provided from the individuals making the loan application that a position of trust was created. This an erroneous suggestion. In *Pardo, supra*, the Court reasoned that the defendant "had no authority over anyone or anything necessary to the commission of his crimes." 25 F.3d at 1192. Petitioner additionally had no authority to approve the loans, the underwriters approved the loans. At anytime, the underwriter could have detected any wrong, in addition to the third-party company, who would, if necessary, perform title searches.

The actions of Petitioner do not reach the threshold requirements set forth in *Pardo, supra*. In keeping with the test established in *Pardo, supra*, the Third Circuit determined the defendant in *United States v. Iannone*, 184 F.3d 214, 223-224 (3d Cir. 1999), who formed his own company and personally convinced individuals to invest monies, did hold a position of trust. The Defendant in *Iannone, supra* is distinguishable from Petitioner in that the defendant had clearly established a system were there existed no checks

and balances to discover his conduct. The defendant in *Iannone*, *supra*, personally sought out the victims and convinced them they were safe investing with him.

Accordingly, the Third Circuit should not have applied the sentencing increase as Petitioner does not satisfy the requirements as having been in a position of trust under U.S.S.G. § 3B1.3.

Petitioner's conduct did not constitute minimal planning. In the *United States v. Chapman*, 241 F.3d 57, 62 (1st Cir. 2001) the Circuit Court examined the three circumstances described in Application n.1(f) of § lB1.1:

> (1) where the amount of planning involved exceeded that which is "typical for commission of the offense in a simple form"; (2) where the defendant has taken significant affirmative steps to conceal the offense; and (3) where the offense involved "repeated acts over a period of time, unless it is clear that each instance was purely opportune."

In *Chapman*, *supra*, the Circuit Court found that since the defendant went to different bank branches, his conduct was not "purely opportune." *Id.* at 62.

Petitioner's conduct did not involve more than minimal planning in that these individuals came in for a loan; Petitioner did not seek them out. Petitioner did not take steps to conceal the offense; on the contrary, he sent these fraudulent loan applications to underwriters and to third party companies to perform title searches. Finally, Petitioner's

circumstances were purely opportune. It was only if someone presented themselves to the bank that he would have an opportunity to complete an application for submission.

During the trial of Petitioner, the District Court settled on the fact that since there were repeated applications processed, there was more than minimal planning and the Third Circuit accepted the interpretation without further review. In *United States v. Rust*, 976 F.2d 55 (1st Cir. 1992) the First Circuit reiterated its examination in *United States v. Gregorio*, 956 F.2d 341 (1st Cir. 1992) that there exists an exception to repeated acts alone constituting minimal planning. That exception is the occurrences being purely opportune. *Rust*, 956 F.2d at 57. In Petitioner's circumstances, that exception exists through the individuals initiating application process for a false loan.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JUNE 7, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3745

UNITED STATES OF AMERICA

v.

RAVIDATH RAGBIR,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
D.C. Crim. No. 00-cr-00121-2
District Judge: The Honorable William G. Bassler

Submitted Under Third Circuit LAR 34.1(a)
June 7, 2002

Before: NYGAARD, BARRY, and MAGILL,[1] *Circuit Judges*

(Opinion Filed: June 7, 2002)

OPINION

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1. The Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix A

BARRY, *Circuit Judge*

Following a jury trial, appellant Ravidath Ragbir was convicted of one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371 and six counts of wire fraud in violation of 18 U.S.C. §§ 1343 and 2. After an unsuccessful post-trial motion for a judgment of acquittal or for a new trial, Ragbir was sentenced to thirty months of imprisonment and three years of supervised release and ordered to pay $350,001 in restitution. Ragbir appeals his convictions and sentence. We have jurisdiction pursuant to 28 U.S.C. § 1291 and will affirm.

Ragbir begins by attacking the District Court's order admitting his statement given to West Orange police officers on July 27, 1999.[1] We exercise plenary review of the District Court's determination that this statement, which was a confession, was made voluntarily and accept the Court's factual findings unless clearly erroneous. *See United States v. Swint*, 15 F.3d 286, 288 (3d Cir. 1994). A confession is voluntary if, upon an examination of the totality of the circumstances, it is the product of free will and not police overreaching. *Id.* at 289 (citations omitted).

An examination of the circumstances surrounding Ragbir's confession reveals that it was voluntary. At the time he confessed, he had not been arrested or charged with any

1. Before the District Court, Ragbir moved to supress his statements given to West Orange police officers on July 27, 1999 and July 28, 1999. On appeal, he mentions only the former. We will, therefore, review the District Court's order with respect to that statement only.

crimes. According to Detective Louis Mignone's testimony at the suppression hearing, Ragbir admitted his criminal involvement within minutes after Detective Mignone and James Houlihan, a Household Finance Corporation ("HFC") fraud investigator, entered the interview room where he had been waiting. At that point, Detective Mignone stopped the interview, escorted Ragbir into the detective bureau, and read him his Miranda rights from a preprinted form. Ragbir then signed a written waiver of those rights. Thereafter, Detective Mignone began questioning Ragbir, with a secretary contemporaneously recording the questions and answers into a computer. Ragbir was seated in a chair next to the secretary's desk and was able to see the computer screen as the secretary typed. After the questioning ceased, he was presented the typed statement for his review, revision, and signature. He signed and dated the statement in the presence of Detective Mignone and Houlihan. No police overreaching appears on these facts.

Ragbir counters that the District Court's reliance on Detective Mignone's testimony at the suppression hearing was flawed. Specifically, he asserts that the Court did not but should have credited the testimony of Mark Farnese, an unindicted coconspirator. We will not review the District Court's credibility determination. *United States v. Bethancourt*, 65 F.3d 1074, 1078 (3d Cir. 1995).

Ragbir next attacks the District Court's denial of his motion for a new trial after codefendant Robert Kosch pleaded guilty following the third day of their joint trial. We review for abuse of discretion. *United States v. Weaver*, 267 F.3d 231, 245 (3d Cir. 2001). It is not the rule that a

mistrial must be declared if a codefendant pleads guilty after the start of trial. *See United States v. Gambino*, 926 F.2d 1355, 1364 (3d Cir. 1991) (district court did not abuse its discretion by permitting testimony from witness who started the trial as a defendant but pleaded guilty halfway through). Generally, jury instructions are sufficient to eliminate any potential prejudice to the remaining defendants that might arise from the mid-trial dismissal of a codefendant. *See, e.g.*, *United States v. Daniele*, 886 F.2d 1046, 1055 (8th Cir. 1989); *United States v. Almeida-Biffi*, 825 F.2d 830, 833 & n.2 (5th Cir. 1987); *United States v. Barrientos*, 758 F.2d 1152, 1155-56 (7th Cir. 1985). We presume that juries follow courts' instructions. *Jermyn v. Horn*, 266 F.3d 257, 312 (3d Cir. 2001).

Here, the District Court instructed the jury not to consider in any way Kosch's absence:

> You'll notice that neither Mr. Robert Kosch nor his attorney, Mr. DeGroot, are seated at the defense table. They will be absent from this court for the remainder of the trial. I instruct you that the charges against Robert Kosch are no longer part of the Government's case and they are not to be considered by you at the time of your deliberations. You should not speculate or concern yourselves about the reason for the absence of Mr. Kosch.
>
> You are not to consider his absence in any way when you hear the rest of this case or when you deliberate on a verdict as to Mr. Ragbir.

Appendix A

> The Government has an absolute obligation under the United States Constitution to prove every element of every offense charged against Mr. Ragbir beyond a reasonable doubt. Again I instruct you emphatically that in considering the evidence as to Mr. Ragbir, you shall not take into account the absence of Mr. Kosch. To do otherwise would be to violate your oaths as jurors.

App. at T786-87. The District Court's instructions cured any potential prejudice to Ragbir. Accordingly, the Court did not abuse its discretion in denying Ragbir's motion for a new trial.

Ragbir also challenges the District Court's ruling at trial to admit under Federal Rule of Evidence 403 evidence of fraudulent loans not listed in the Second Superseding Indictment. We review the District Court's ruling for abuse of discretion. *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 180 (3d Cir. 2000). There is no such abuse here. As charged in the Second Superseding Indictment, Ragbir intentionally processed false mortgage loan applications in furtherance of his scheme with Kosch without conducting the required background checks. At trial, the government sought to introduce evidence of false loan applications processed by Ragbir in the names of Colon, Jurschen, and Liaci during the period of the conspiracy.[2] These loans were named in Ragbir's July 27, 1999 confession, which was already in evidence. The District Court reasonably concluded that the evidence had a tendency to prove the falsity of the loan

2. October 1998 through July 1999.

applications and thereby the existence of a scheme to defraud HFC through false loan applications. The Court also reasonably concluded that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice to Ragbir. Indeed, it characterized the evidence as "the standard bread-and-butter type of evidence the Government puts in every type of case." App. at T781. We agree.

Following the trial, Ragbir moved for a judgment of acquittal or for a new trial because the jury's verdict was not supported by sufficient evidence. He claims the District Court improperly denied his motion. A judgment of acquittal is appropriate "[o]nly when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt." *United States v. McNeill*, 887 F.2d 448, 450 (3d Cir. 1989) (quoting *Brandom v. United States*, 431 F.2d 1391, 1400 (7th Cir. 1970)).

There is sufficient evidence in the record before us to support Ragbir's convictions. First and foremost, his July 27th and 28th statements make quite clear that he agreed with Kosch to obtain money from HFC through the use of false loans and that such money was, in fact, obtained. For example, in his July 27th statement, Ragbir recounts:

> He [Kosch] told me that he wanted me to do business with him through my company [HFC] and set up real estate loans for people that he would send to me as referrals. He told me that he wanted to get the money from the loans and would send people to me to use false names and

> information and offered to me one point of each loan. One point is one-percent of the dollar amount of each loan. I told him that I would do it for him.

App. at 112. Later in that statement, Ragbir lists twenty-one different loans that he fraudulently submitted under his arrangement with Kosch. Ragbir's statement of July 28th similarly confirms the conspiracy:

> He [Kosch] is the guy that was running the whole scheme through me at my job Household Finance between December 1998 and now. He has organized the filing of 1.5 million dollars worth of fraudulent loans by using me to process the loans through Household Finance and allow others to assume false identities to apply for the loans.

App. at 115. In addition to Ragbir's statements, the government introduced into evidence the false loan applications processed by Ragbir, closing documents, supporting documents, and loan checks.

Testimony from coconspirators confirmed that the applications contained false information and that the closing documents were forged. Specifically, Gina Cofone, a coconspirator, testified that she met with Ragbir at HFC to complete the required loan documents at which time she impersonated Mary Mays and forged Mays's signature on the documents. According to Cofone, Ragbir knew her true identity at the time she signed the documents. Mays died before trial,

but her daughter testified that her mother had never obtained a loan from HFC and had never signed any loan documents. Next, Janice Cubellis, also a coconspirator, testified that she met with Ragbir at HFC to sign loan documents as Marie Childs, and that Ragbir became aware of her true identity before the loan transaction was completed. At trial, the government called Muzethel Childs as a witness. She attested that she had never been to HFC, had never sought a loan from HFC, and had never signed any loan documents. Finally, Rema Perry, another coconspirator, testified that she met with Ragbir at HFC and forged Sudie Smith's name to loan documents. As with the other coconspirators, Ragbir knew Perry's true identity before she signed the loan documents. Smith testified at trial that she had never discussed a loan with anyone from HFC and had never signed any documents. This testimony along with that of others is more than sufficient to support Ragbir's convictions, and the motion for a judgment of acquittal was properly denied. So, too, was the motion for a new trial. A new trial may be granted "if the interests of justice so require." Fed. R. Crim. P. 33. For the reasons above stated, the interests of justice do not so require here.

In a final effort to attack his convictions, Ragbir asserts that the references at trial to $1.5 million as HFC's loss constitutes reversible error. In support of his assertion, he relies on *United States v. Beattie*, 594 F.2d 1327 (9th Cir. 1979). We find *Beattie* inapposite. There, the two defendants, one a furniture salesman and the other a loan officer of a bank, formed a conspiracy to defraud the bank by submitting false loan applications. The actual loss from the conspirators'

false loan applications was $17,000. At trial, however, the government called as a witness the bank auditor who testified that the bank's loss was $315,000. The larger figure included loans issued by the loan officer independent of the conspiracy. In summation, the government referred to the $315,000 figure as the loss resulting from the conspiracy. The Ninth Circuit held that the references to $315,000 were prejudicial.

The facts of *Beattie* are, of course, quite different from those before us. Here, the only references to $1.5 million during the trial were contained in Ragbir's statements. Furthermore, the $1.5 million figure referred to the face value of the loans, not the amount of money actually lost by HFC. That figure was estimated at $400,000, which is the amount the government mentioned in its opening and closing statements. This $400,000 figure was also the amount identified in the Second Superseding Indictment. After trial but before sentencing, the parties stipulated that HFC's actual loss was more than $350,000 but less than $500,000. At no time did the government attempt to show that the loss to HFC was $1.5 million. No error occurred.

In addition to attacking his convictions, Ragbir attacks his sentence. First, he argues that the District Court improperly found that his conduct involved more than minimal planning, as defined in U.S.S.G. § 2F.1.1(b)(2)(A). We review the District Court's factual finding for clear error. *United States v. Yeaman*, 194 F.3d 442, 456 (3d Cir. 1999). Section 2F1.1(b)(2)(A) provides for a two-point increase in the offense level if the defendant's conduct involved

more than minimal planning.[3] As the commentary explains, such planning exists "in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." U.S.S.G. § 1B1.1, cmt. n.1(f) (2000). Here, the District Court reasonably concluded that Ragbir's repeated processing of false loan applications constituted more than minimal planning.

Second, Ragbir maintains that the District Court incorrectly concluded that his position at HFC as an account executive was a position of trust under U.S.S.G. § 3B1.3.[4] This determination is a legal conclusion subject to plenary review. *United States v. Iannone*, 184 F.3d 214, 222 (3d Cir. 1999). According to the commentary to U.S.S.G. § 3B1.3, a position of trust involves "professional or managerial discretion." U.S.S.G. § 3B1.3, cmt. n.1 (2000). In determining whether a position involves such discretion, we consider three factors: "(1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in defendant vis-a-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position." *United States v. Pardo*, 25 F.3d 1187, 1192 (3d Cir. 1994). We have previously found that a bank teller, who processed false Western Union money orders without conducting the appropriate verification procedures, occupied a position of trust. *United States v. Craddock*, 993 F.2d 338, 343-44 (3d Cir. 1993).

---

3. The 2000 edition of the Guidelines Manual was used in calculating Ragbir's sentence.

4. Ragbir does not assert that if he occupied a position of trust, he did not abuse that trust.

Appendix A

A consideration of the above factors, particularly in light of *Craddock*, leaves little doubt that Ragbir held a position of trust. As a HFC account executive, Ragbir was given virtually unlimited discretion to choose which applications to pursue. If he determined that an application was viable, he was responsible for completing the application form, collecting the necessary supporting documents from the applicant, examining the applicant's credit report, and verifying that the application, documents, and report were consistent. Any major inconsistencies had to be reconciled before Ragbir could forward the application to an underwriter. The HFC underwriters in Illinois relied heavily on his recommendations when deciding to approve the applications and, with the exception of real estate loans, did not independently review the supporting documentation.

Ragbir, therefore, was particularly well-situated to perpetrate the loan fraud scheme. He willingly processed false applications referred to him by Kosch. He then knowingly filled in false information on the application forms and submitted them to underwriters without conducting the appropriate verification. Relying on his recommendations, the underwriters approved the loans. Indeed, but for his assistance, the conspiracy could not have been successful. Accordingly, the District Court correctly concluded that Ragbir violated a position of trust in a manner that significantly facilitated the conspiracy to defraud HFC.

For the foregoing reasons, we will affirm the judgment of the District Court.

Appendix A

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

s/ Maryanne Trump Barry
Circuit Judge

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3745

UNITED STATES OF AMERICA

v.

RAVIDATH RAGBIR,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
D.C. Crim. No. 00-cr-00121-2
District Judge: The Honorable William G. Bassler

Submitted Under Third Circuit LAR 34.1(a)
June 7, 2002

Before: NYGAARD, BARRY, and MAGILL,* *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was submitted on June 7, 2002.

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* The Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix A

After consideration of all contentions raised by the appellant, it is

ADJUDGED and ORDERED that the judgment of conviction and sentence be and hereby is affirmed. No costs. All in accordance with the Opinion of the Court.

ATTESTL

s/ [illegible]
Clerk

Dated: 7 June 2002

APPENDIX B — MEMORANDUM OPINION AND ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED SEPTEMBER 12, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Crim. No. 00-121
(WGB)

UNITED STATES OF AMERICA,

v.

RAVIDATH RAGBIR,

Defendant.

MEMORANDUM OPINION AND ORDER

BASSLER, DISTRICT JUDGE:

This matter comes before the Court for the sentencing of Defendant Ravidath Ragbir ("Ragbir"), who has been convicted of seven counts of fraud and conspiracy to defraud Household Financial Corporation ("HFC").

I. *INTRODUCTION*

On May 19, 2000, Ragbir and Co-Defendant Robert Kosch, a/k/a "Robert Taylor" ("Kosch") were charged on a Superseding Indictment. Count One charged Ragbir and Kosch with

conspiracy to engage in a scheme to obtain money by false pretenses through the preparation and submission of false loan applications during the time period of October 1998 through July 27, 1999, in violation of 18 U.S.C. § 371 and 18 U.S.C. § 1343. Counts Two through Seven charged Ragbir and Kosch with the substantive counts of wire fraud, in violation of 18 U.S.C. § 1343, and aiding and abetting, in violation of 18 U.S.C. § 2. Count Eight charged Kosch with illegal use of a social security number, in violation of 42 U.S.C. § 408 (a)(7)(B) and 18 U.S.C. § 2.

The trial against both Ragbir and Kosch commenced on November 6, 2000. During the trial, on November 14, 2000, Kosch entered a guilty plea to Count One of the Superseding Indictment. On November 29, 2000, the jury convicted Ragbir on Counts One through Seven.

Defendant objects to the calculation of the base offense level as well as several other sentencing enhancements recommended in the Pre-Sentence Report ("PSR"). Defendant also makes a number of objections regarding some factual inaccuracies contained in the PSR; because such information does not affect the Guidelines, the Court does not address these objections. For all other sentencing matters, except as otherwise noted, the Court accepts the PSR as its findings of fact. *See* Fed. R. Crim. P. 32(4)(6)(B).

II. *DISCUSSION*

A. *More Than Minimal Planning*

Probation recommends a two level enhancement pursuant to U.S.S.G. § 2F1.1(b)(2)(A) for more than minimal planning.

Appendix B

"More than minimal planning" is defined in § 1(f) of the commentary to § 1B1.1 as "more planning than is typical for commission of the offense in a simple form." It is deemed present in any case "involving repeated acts over a period of time, unless it is clear that each instance was purely opportune."

A determination of "more than minimal planning is considered a factual question subject to only a "clearly erroneous" standard of review by the Third Circuit. *U.S. v. Cianscewski*, 894 F.2d 74, 82 (3d Cir. 1990). In *Cianscewski*, the Third Circuit upheld the district court's determination that the defendant, by receiving seven stolen checks and selling them to undercover agents on three separate occasions over a three week period, satisfied the definition of "more than minimal planning. *Id.* at 82-83.

Here, just as the defendant in *Cianscewski*, Ragbir participated in repeated acts of fraud. Moreover, while Ragbir identifies misconduct he did *not* engage in, such as recruiting false loan applicants, creating the false identification documents, or transmitting loan proceeds outside his position at HFC, the proper inquiry is what Ragbir did do; Ragbir used false paperwork created by Kosch to make computerized loan applications from the falsified documents and also attended closings with people he knew were posing as other individuals. Such activities required more than minimal planning. Therefore, a two level increase in the base offense level is warranted.

Appendix B

B. *Abuse of a Position of Trust*

U.S.S.G. § 3B1.3 provides in pertinent part:

> If the defendant abused a position of public or private trust, . . . in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

When applying § 3B1.3, a court must first resolve the legal question of whether the defendant served in a position of public or private trust. *United States v. Iannone*, 184 F.3d 214, 222 (3d Cir. 1999). If the defendant did serve in a position of trust, the court must next determine the factual issue of whether the defendant "abused this position of trust in a way that significantly facilitated his crime." *Id.* (citing *United States v. Craddock*, 993 F.2d 338, 340 (3d Cir 1993)).

Neither § 3B1.3 nor the commentary to the Guidelines provides a specific definition regarding what constitutes "a position of trust." *Id.* Application Note 1 of the Commentary, however, provides some guidance, stating in part that a position of trust is:

> characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are

> subject to significantly less supervision than employees whose responsibilities are primarily nondiscretionary in nature.
>
> This adjustment, for example, would apply in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment would not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk . . . .

Recognizing that there is no bright-line test, the Third Circuit relies on three factors to determine whether a position constitutes a position of trust pursuant to § 3B1.3. *United States v. Pardo*, 25 F.3d 1187, 1191 (3d Cir. 1994). The three considerations are as follows:

> (1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in defendant vis-a-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position.

Id. at 1192. When those factors are analyzed, courts should be cognizant of the purpose behind the guideline, which is to "punish 'insiders' who abuse their positions rather than those who take advantage of an available opportunity." *Id.* at 1192.

Appendix B

Ragbir served as an account executive at HFC. In that position, Ragbir was able to commit a difficult-to-detect wrong. PSR § 40. Central to that determination is the fact that Ragbir's position provided him with the freedom to engage in his misconduct. *Pardo*, 25 F.3d at 1191. Admittedly, as an account executive, Ragbir was not in a managerial position at HFC, but rather, was subject to supervision by managers above him and held the lowest sales position that HFC offered in the individual branch offices. Nevertheless, being an account executive enabled Ragbir to advance the conspiracy by allowing others to assume false identities to apply for the loans. Ragbir was therefore in a position that enabled him to commit a difficult-to-detect wrong.

As for the second *Pardo* factor, the level of authority vested in Ragbir provided him with the "wherewithal to commit the wrongful act. *Pardo*, 25 F. 3d at 1192. Although Ragbir was not able to notarize closing documents for a loan on which he was expecting to receive a commission and could not authorize his own loans, by virtue of his position at HFC, Ragbir was able to process bad loans based on applicants' names, addresses, and social security numbers, which he knew were false.

Regarding the third *Pardo* factor, HFC relied on Ragbir's integrity. HFC gave Ragbir the responsibility of verifying information on loan applications, which HFC then relied on when approving loans. Had Ragbir refused to process the loans or informed HFC that the loan applications were based on false information, HFC would not have approved those loans.

Appendix B

Having determined that Ragbir occupied a position of trust, the Court must determine whether he "abused this position of trust in such a way that significantly facilitated the crime." *Pardo*, 25 F.3d at 1191 (citing *United States v. Craddock*, 993 F.2d 338, 340 (3d Cir 1993)). Clearly, without Ragbir to process the loans and allow others to assume false identities to apply for the loans, the fraud and conspiracy could not have been effectuated.

Because Ragbir abused a position of public trust in a manner that significantly facilitated in defrauding HFC, the base offense level will be increased by 2 levels.

III. *CONCLUSION*

For the foregoing reasons, the Court concludes that a downward adjustment for a minimal role is not warranted and that a two-level enhancement for abuse of a position of trust is warranted.

SO ORDERED.

s/ William G. Bassler
William G. Bassler, U.S.D.J.

Dated: September 12, 2001

Appendix B

UNITED STATES DISTRICT COURT
District of New Jersey

Case Number 2:00cr121-2

UNITED STATES OF AMERICA

v.

RAVIDATH RAGBIR

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, RAVIDATH RAGBIR, was represented by Patricia Lee, Esq.

The defendant was found guilty on count(s) 1s,2s,3s,4s, 5s,6s, & 7s by a jury verdict on 29 November 2000 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:371	Conspiracy to commit Wire Fraud	10/98-7/99	1s
18:1343 & 2	Wire Fraud	"	2s,3s,4s,5s, 6s & 7s

Appendix B

As pronounced on 12 September 2001, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $700.00, for count(s) 1s,2s,3s, 4s,5s,6s, & 7s, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 12th day of September, 2001.

s/ William G. Bassler
WILLIAM G. BASSLER
United States District Judge

Appendix B

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 30 Months on each of counts 1s,2s,3s,4s,5s,6s, & 7s to run concurrently.

The Court makes the following recommendations to the Bureau of Prisons: Facility close to Family.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

Appendix B

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years on each of counts 1s,2s,3s,4s,5s,6s, & 7s to run concurrently.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

> Based on information presented, the defendant is excused from the mandatory drug testing provision, however, may be requested to submit to drug testing during the period of supervision if the probation officer determines a risk of substance abuse.
>
> If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
>
> If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

and shall comply with the following additional conditions:

> The defendant shall provide the U.S. Probation Officer with full disclosure of his financial records

to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income.

The defendant shall cooperate with the Immigration and Naturalization Service to resolve any problems with his status in the United States. The defendant shall provide truthful information and abide by the rules and regulations of the Immigration and Naturalization Service. If deported, the defendant shall not re-enter the United States without the written permission of the Attorney General. If the defendant re-enters the United States, he shall report in person to the nearest U.S. Probation Office within 48 hours.

The defendant is prohibited from incurring any new credit charges or opening additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with a payment schedule for any fine or restitution obligation. The defendant shall not encumber or liquidate interest in any assets unless it is in direct service of the fine or restitution obligation or otherwise has the express approval of the Court.

Appendix B

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

Appendix B

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

Appendix B

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix B

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	**Amount of Restitution**
Household Investigations 1301 East Tower Road Schaumburg, Illinois 60173 Attn: James Houlihan	$350,001.00

Payments of restitution are to be made to U.S. Treasury mailed to Clerk, U.S.D.C., 402 East State Street, Rm 2020, Trenton, New Jersey 08608 for distribution to the following victim: The Payee. The amount ordered represents the total amount due to the victim for this loss. This obligation is joint and several with co-defendant Robert Kosch. The defendant's restitution obligation shall not be affected by any restitution payments made by defendant Kosch in this case, except that no further payments shall be required after the sum of the amounts actually paid by all defendants has fully satisfied the loss.

Restitution, plus any interest pursuant to 18 USC § 3612(f)(1), shall be paid. The court will waive the interest requirement. It is recommended that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program. In the event the entire restitution is not paid prior to commencement of supervision, the defendant shall satisfy the amount due in

monthly installments of no less than $300.00 over a period of three (3) years to commence thirty (30) days after the release from custody.

Any payment shall be divided proportionately among the payees named unless otherwise specified here:

Appendix B

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	19
Criminal History Category:	I
Imprisonment Range:	30 months to 37 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$6,000.00 to $60,000.00
Restitution:	$350,001.00

The fine is waived because of the defendant's inability to pay.

Full restitution is not ordered for the following reason(s): By stipulation the government, full restitution determined by probation (426,083.03) was not ordered.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED MARCH 1, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Crim. No. 00-121
(WGB)

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAVIDATH RAGBIR,

Defendant.

OPINION AND ORDER

BASSLER, DISTRICT JUDGE:

Defendant Ravidath Ragbir ("Ragbir" or "Defendant") moves for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c), or alternatively, for a new trial pursuant to Fed. R. Crim. P. 33. Oral argument was heard on March 1, 2001. For the reasons set forth below, the Court **denies** Defendant's motion.

Appendix C

I. *INTRODUCTION*

On May 19, 2000, Ragbir and Co-Defendant Robert Kosch, a/k/a "Robert Taylor" ("Kosch") were charged on a Superseding Indictment. Count One charged Ragbir and Kosch with conspiracy to engage in a scheme to obtain money by false pretenses through the preparation and submission of false loan applications during the time period of October 1998 through July 27, 1999, in violation of 18 U.S.C. § 371 and 18 U.S.C. § 1343. Counts Two through Seven charged Ragbir and Kosch with the substantive counts of wire fraud, in violation of 18 U.S.C. § 1343, and aiding and abetting, in violation of 18 U.S.C. § 2. Count Eight charged Kosch with illegal use of a social security number, in violation of 42 U.S.C. § 408(a)(7)(B) and 18 U.S.C. § 2.

The trial against both Ragbir and Kosch commenced on November 6, 2000. During the trial, on November 14, 2000, Kosch entered a guilty plea to Count One of the Superseding Indictment. At the close of the Government's case, Ragbir moved to dismiss the Indictment. The Court reserved decision on the motion and submitted the case to the jury. On November 29, 2000, the jury convicted Ragbir on Counts One through Seven.

Defendant Ragbir moves for a judgment of acquittal or for a new trial contending that there was insufficient evidence to support a conviction on all counts in the Superseding Indictment.

Appendix C

II. *DISCUSSION*

A. *Motion for Judgment of Acquittal*

"[A] judgment of acquittal should be entered only upon consideration of the sufficiency of the Government's evidence." *United States v. Giampa*, 758 F.2d 928, 934-35 (3d Cir. 1985); *see also United States v. Cicco*, 938 F.2d 441, 446 (3d Cir. 1991). "A defendant challenging the sufficiency of the evidence bears a heavy burden." *United States v. Casper*, 956 F.2d 416, 421 (3d Cir. 1992); *United States v. McGlory*, 968 F.2d 309, 321 (3d Cir. 1992); *see generally United States v. Veksler*, 62 F.3d 544 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 780 (1996). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Moreover, the trial court is obliged to uphold the jury's verdict unless no rational jury could have concluded beyond a reasonable doubt that a defendant committed the crimes charged. *United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir.), *cert. denied*, 469 U.S. 858 (1984); *United States v. Obialo*, 23 F.3d 69, 72 (3d Cir. 1994). "[S]uch a decision will be confined to cases where the prosecution's failure is clear." *Burks v. United States*, 437 U.S. 1, 17 (1978). In making this determination, the Court must view the evidence and the inferences logically deducible in the light most favorable to the government. *United States v. Wright*, 845 F. Supp. 1041, 1055 (D.N.J.), *aff'd*, 46 F.3d 1120 (3d Cir. 1994); *Obialo*,

23 F.3d at 71-72. The Court may not invade the jury's province, *see United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984), by evaluating the credibility of witnesses. *See Giampa*, 758 F.2d at 935. " 'Only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt,' " may a verdict be overturned. *United States v. McNeill*, 887 F.2d 448, 450 (3d Cir. 1989), *cert. denied*, 493 U.S. 1087 (1990) (citation omitted).

1. *Count One*

Count One charges Ragbir with conspiracy to carry out a scheme to defraud Household Financial Corporation ("HFC") through the processing of false loan applications. Ragbir claims that the Government failed to prove that he knowingly entered into, or became of a member of, a criminal conspiracy.

First, Ragbir argues that Kosch initiated the conspiracy to defraud HFC prior to Ragbir's involvement in the processing of loans in October 1998. Although Ragbir may have not joined the conspiracy until some time after it commenced, and may not have had knowledge of the earlier activities of the conspiracy, those facts are insufficient grounds to overturn the jury's verdict.

It is well settled that a person need "be a member of the conspiracy from its beginning; he can join it at any point during its progress and be held responsible for what's done so long as he remains a member of the conspiracy." *United States v. Berkery*, 889 F.2d 1281, 1284 (3d Cir. 1989).

Appendix C

A person may become a member of a conspiracy without knowing all of the particular aspects, goals, and participants of the conspiracy. *United States v. Adams*, 759 F.2d 1099, 1114 (3d Cir.), *cert. denied*, 474 U.S. 906 (1985). Therefore, the fact that Ragbir may not have participated in the conspiracy at its inception is, as a matter of law, an inadequate basis to overturn the jury's verdict.

Second, Ragbir contends that the evidence was insufficient to allow the jury to find that he was a member of a conspiracy because each of the three cooperating co-conspirators, Rema Perry ("Perry"), Gina Cofone ("Cofone"), and Janice Cubellis ("Cubellis"), indicated that her agreement to pose as a fake loan applicant at HFC was solely at the direction and in agreement with Kosch.

The Court disagrees; contrary to Ragbir's assertions, the Government produced sufficient evidence to support the jury's verdict. Each of the women, upon specific direction from Kosch, asked for Ragbir upon arrival at HFC's West Orange Office to present and sign papers using fake names. Nov. 17 Trial Tr., 77:12-13 (Perry); Nov. 15 Trial Tr., 100:21-22, 101:19-20 (Cofone); Nov. 16 Trial Tr., 30:20-25, 32:1-18 (Cubellis). With the exception of Cubellis, the other two women testified that they had met Ragbir prior to signing papers at HFC and that he knew, or at least should have known, their real names. Nov. 15 Trial Tr., 103:19-104:5; Nov. 17 Trial Tr., 69:2-70:24; *see* discussion *infra*. Such evidence could have formed the basis of the jury's determination that Ragbir knowingly entered into, and became a member of, the criminal conspiracy.

Nevertheless, while relying on the cooperators' testimonies, Ragbir inconsistently then argues that the testimony from Perry and Cofone regarding Ragbir's knowledge of their unlawful agreements with Kosch is "inherently untrustworthy." Def.'s Br., at 7. As noted earlier, however, when ruling on a motion for a judgment of acquittal, the Court may not evaluate the credibility of witnesses. *See Giampa*, 758 F.2d at 935.

Moreover, Ragbir fails to explain how in the face of his two confessions, which were admitted into evidence, it was unreasonable for a rational jury to have concluded beyond a reasonable doubt that he committed the crime charged. In his July 27, 1999 sworn confession, Ragbir informed Detective Mignone of the West Orange Police Department that $1.5 million had been defrauded from HFC as a result of his and Kosch's scheme and that he had an "agreement" with Kosch to process loans from HFC for people using false names. Ragbir also admitted that he took applicants' information, such as names, addresses, social security numbers, and did so deliberately without verifying such information. He also identified specific loans that he had processed, which he knew to be bad loans. Those included the HFC loans to Sudie Smith (Rema Perry), Mary Mays (Gina Cofone), and Marie Childs (Janice Cubellis).

Additionally, in his July 28, 2000 confession, Ragbir identified Kosch as "the guy that was running the whole scheme through me at my job Household Finance between December 1998 and now" and again explained that Kosch "organized the filing of 1.5 million dollars worth of fraudulent loans by using me to process the loans through Household Finance and allow others to assume false identities to apply for the loans."

Finally, Ragbir believes it notable that in his confessions to the West Orange Police Department, he did not indicate that he knew the cooperators by any other name other than their respective fake names. To prove criminal conspiracy in violation of 18 U.S.C. § 371, however, the Government need not prove that Ragbir knew the real names of the individuals who submitted fraudulent loan applications; rather, it need only show: (1) the existence of an agreement; (2) an overt act by one of the conspirators in furtherance of the objective; and (3) an intent to agree and to defraud the United States. *See United States v. Rankin*, 870 F.2d 109, 113 (3d Cir. 1989). Here, by his own admission, Ragbir intentionally entered into an agreement to process fraudulent loans through HFC and did in fact, process such loans. Again by his own admission, among the loans Ragbir knew to be bad were the loans for Mary Mays, Marie Childs, and Sudie Smith.

In any event, there was in fact sufficient evidence for a jury to believe that Ragbir knew Cofone and Perry by their real names. Cofone testified at trial that sometime in May of 1999, Ragbir introduced her as "Mary Mays" to the notary public at HFC. Nov. 15 Trial Tr., 101:19-103:18. Prior to that time, however, Ragbir had met Cofone on a number of occasions and had called her "Gina." *Id.* at 103:19-104:5. In fact, Cofone stated that during the first six months in 1999, when Ragbir called Kosch's office and Cofone would answer the phone, Ragbir recognized her voice and always addressed her as "Gina." *Id.* at 95:12-17.

As for Perry, she testified at trial that prior to her first trip to HFC, she saw Ragbir on a number of occasions at Kosch's office. Nov. 17 Trial Tr., 69:2-70:24. During those

times, everyone called her "Rema" and Kosch called her "Perry." *Id.*

The foregoing presents sufficient evidence for a jury to determine that Ragbir knowingly entered into, and became of a member of, a criminal conspiracy. Ragbir's motion for a judgment of acquittal on Count One is denied.

2. *Counts Two Through Seven*

Ragbir contends that the Government failed to present sufficient evidence that he knowingly and willfully participated in the scheme to defraud with the specific intent to defraud. *United States v. Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996). Ragbir's contention is unavailing. As discussed above, Ragbir's two confessions and the trial testimonies of Perry, Cofone, and Cubellis, provide a sufficient basis for a jury to find that Ragbir knowingly and willfully intended to defraud HFC.

Regardless, to challenge the sufficiency of the Government's evidence, Defendant relies on the fact that HFC did not require loan applicants to meet anyone at the company prior to the date of the loan closing. Nov. 9 Trial Tr., 91:1-3; Nov. 20 Trial Tr., 65:5-77:20. Moreover, Defendant points out that 90% of the loan applications were taken by account executives over the phone. *Id.* Ragbir also notes that he had no authority to give final approval to loans that he processed, or to notarize his own loan documents. Nov. 14, Trial Tr., 100:12-101:5, 117:6-9, 128:22-131:11.

Appendix C

Ragbir's arguments are legally irrelevant to the determination of whether he knowingly and willfully intended to defraud HFC. As the Government correctly observes, the fact that loan information was often taken over the phone, or that other HFC employees were also responsible for reviewing, verifying and approving the loan applications, does not negate the conclusion that Ragbir knowingly and intentionally defrauded HFC.

Ragbir has failed to show that there was no credible evidence to support the jury's verdict. Viewing the evidence in a light most favorable to the Government, the Government produced "sufficient evidence" for a rational trier of fact to conclude beyond a reasonable doubt that Defendant engaged in a scheme to obtain money by false pretenses through the preparation and submission of false loan applications, and also engaged in wire and mail fraud.

B. *Motion For New Trial*

The district court may grant a new trial if it is required in the "interest of justice." Fed. R. Crim. P. Rule 33. The burden of justifying a new trial rests with the defendant. *See United States v. Geders*, 625 F.2d 31, 33 (5th Cir. 1980).

In contrast to a motion for judgment of acquittal, when deciding whether to grant a new trial,

> [t]he district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court

> concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980); *see also United States v. Walker*, 899 F. Supp. 14, 15 (D.D.C. 1995), *aff'd* 99 F.3d 439 (D.C. Cir. 1996). For example, a motion for a new trial may be granted where there has been prosecutorial misconduct, or if the evidence is such that the jury's verdict is not rational. *United States v. Dixon*, 658 F.2d 181, 193 (3d Cir. 1981).

Motions for a new trial are not favored and therefore, the authority to grant a new trial should be exercised sparingly and with caution. *Lincoln*, 630 F.2d at 1319; *United States v. Lowell*, 490 F. Supp. 897, 904 (D.N.J. 1980), *aff'd* 649 F.2d 950 (3d Cir. 1981). In fact, district courts have been cautioned not to "reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *United States v. Martinez*, 763 F.2d 1297, 1312-13 (11th Cir. 1985). Moreover, the court "should hold in mind the harmless error provisions of Rule 52, and refuse to grant a new trial if the substantial rights of the defendant were not affected." C.A. Wright, 3 *Federal Practice and Procedure*, § 551 (1982); *Walker*, 899 F. Supp. at 15. Ultimately, the decision whether or not to grant a motion for a new trial rests within the sound discretion of the trial court. *United States v. Console*, 13 F.3d 641, 665 (3d Cir. 1993).

Appendix C

Defendant contends that a new trial is warranted because the evidence presented by the Government was not sufficiently credible to show the specific knowledge and intent required to prove the conspiracy count. Specifically, Ragbir challenges the credibility of Detective Mignone and the three cooperators. Notwithstanding the credibility of the Government's witnesses, the jury's verdict is not against the weight of the evidence, particularly in light of Ragbir's two confessions.

Next, to support the claim that he did not know the true nature of the conspiracy, Ragbir again relies on the argument that he did not know that the real names of certain loan applicants, for example, Mary Mays, Marie Childs, and Sudie Smith. Further, Ragbir maintains that other HFC employees were responsible for reviewing and notarizing the loan applications and that he was not required under HFC procedure, to verify certain information. Finally, Ragbir also contends that the three female cooperators identified themselves using their fake names, to other HFC employees, such as the notary public and the receptionist.

Such allegations, even if true, do not negate the jury's conclusion that Ragbir knew that certain loan applications were fraudulent. *See* discussion *supra*. Defendant has failed to show that the jury's verdict was not rational or against the weight of the evidence. Therefore, a new trial in the "interest of justice" is not warranted.

Appendix C

III. *CONCLUSION*

For the foregoing reasons, the Court **denies** Defendant's motion for a judgment of acquittal, or alternatively, for a new trial.

SO ORDERED.

s/ William G. Bassler
William G. Bassler, U.S.D.J.

Dated: March 1, 2001

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED OCTOBER 24, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Crim. No. 00-121 (WGB)

UNITED STATES OF AMERICA

v.

ROBERT KOSCH, a/k/a "Robert Taylor,"
and RAVIDATH RAGBIR

Defendants.

MEMORANDUM OPINION AND ORDER

BASSLER, DISTRICT JUDGE:

I. *Background*

This matter comes before the Court on the Omnibus motions of Defendants Ravidath Ragbir ("Ragbir") and Robert Kosch ("Kosch") (collectively "Defendants") and on the cross motion of the United States ("the Government").

Count One of the Superseding Indictment charges Defendants with conspiracy to engage in a scheme and artifice to defraud Household Finance Corporation ("HFC") and obtain money and property by false pretenses through the

preparation and submission of false loan applications during the time period of October 1998 through July 27, 1999, in violation of 18 U.S.C. § 371 and 18 U.S.C. § 1343. Counts Two through Seven charge Defendants with the knowing and willful transmission of writings, signals and sounds, by means of wire communication in interstate commerce, for the purpose of executing and attempting to execute the scheme alleged in Count One, in violation of 18 U.S.C. § 1343. Count Eight of the Superseding Indictment charges Kosch with knowingly and with the intent to deceive, presenting a false social security number on loan applications and supporting documentation submitted to HFC, in violation of Title 42 United States Code § 408(a)(7)(B) and 18 U.S.C. § 2.

II. *Discussion*

A. *Brady, Giglio and Jencks Act Material*

Defendants seek early disclosure of material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Gialio v. United States*, 405 U.S. 150 (1972) and the Jencks Act, 18 U.S.C. § 3500. Defendants' motions are **denied.**

The government acknowledges its obligations under *Brady*, *Giglio* and the Jencks Act. The Court, nevertheless, would like to clarify those obligations here.

In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Brady, 373 U.S. at 87. With respect to impeachment evidence, "[w]hen the 'reliability of a given witness may be determinative of guilt of innocence,' nondisclosure of evidence affecting credibility falls within [the *Brady*] rule." *Giglio*, 405 U.S. at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). In applying *Brady*, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Where the requested *Brady* material can only be used to impeach the credibility of government witnesses, i.e., falls within the scope of *Giglio*, it is generally sufficient for the government to disclose it the day the witness testifies. *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983), *cert. denied*, 464 U.S. 1048 (1984).

Under the Jencks Act, the government need not produce statements or reports made by a government witness or prospective witness until the "witness has testified on direct examination in the trial of the case." 18 U.S.C. § 3500(b); *United States v. Murphy*, 569 F.2d 771, 773 (3d Cir. 1978), *cert. denied*, 435 U.S. 955 (1978).

Long-standing Third Circuit policy encourages early *Brady* production. *United States v. Starusko*, 729 F.2d 256, 261 (3d Cir. 1984). In keeping with this policy, this Court will require the government to permit defense counsel to inspect and copy any directly exculpatory *Brady* material as soon as reasonably possible after the government becomes aware of such material. The fact that material may also fall within the Jencks Act does not excuse prompt compliance with *Brady*.

Furthermore, to prevent delays at trial, the government has agreed to produce *Giglio* and Jencks Act material no later than seven (7) days before the witness in question testifies at trial.

In the interests of justice, the Court therefore orders:

(1) If the government has any questions whether material falls within the scope of *Brady*, it should resolve the issue in favor of making the material available to the defendant, to further the Third Circuit policy of encouraging disclosure. *See also United States v. Agurs*, 427 U.S. 97, 108 (1976) ("(T]he prudent prosecutor will resolve doubtful questions [of *Brady* material] in favor of disclosure."). The parties should notify the Court of disputes or questions as to whether *specific* material falls within the scope of *Brady*.

(2) *Giglio* and Jencks Act materials shall be disclosed not later than seven (7) days before the witness in question testifies at trial. If defense counsel needs additional time, beyond the time given by the government, to examine and prepare *Giglio* and Jencks Act materials, the defense may apply to the Court for a recess. If the government believes that the disclosure of certain impeachment or Jencks Act materials should be restricted, it may apply for a protective order.

B. *Grand Jury Transcripts*

Defendants request access to the grand jury transcripts in this matter to determine whether prosecutorial abuses led to the present indictment, and whether the government had

valid grounds to indict Defendants. Additionally, Kosch specifically requests the grand jury transcript of co-Defendant Ragbir in order to evaluate his credibility; Kosch claims Ragbir may be a witness in this case.

The United States Supreme Court has recognized that secrecy is vital to the functioning of the grand jury system. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). Therefore, a party seeking disclosure of grand jury transcripts under Fed. R. Crim. P. 6(e) must show that (1) the material sought is needed to avoid a possible injustice in another proceeding; (2) the need for disclosure is greater than the need for continued secrecy; and (3) the request is structured to cover only material so needed. *Id.* at 222.

Grand jury proceedings are presumed to be valid and this presumption of regularity may be overcome "only upon a particularized proof of irregularities in the grand jury process." *United States v. Mechanik*, 475 U.S. 66, 75 (1986) (O'Connor, J., concurring). It is insufficient merely to speculate, as Defendants do, that irregularities may have occurred. *United States v. Budzarioski*, 462 F.2d 443, 454 (3d Cir. 1972). Similarly, when an indictment is valid on its face, as is the case here, its evidentiary basis cannot be contested. *Costello v. United States*, 350 U.S. 359, 363-64 (1956).

The Court finds that Defendants have not made a sufficient showing to justify release of the grand jury transcripts. Furthermore, to the extent that the testimony of specific witnesses is requested for credibility purposes, it will turned over in due course in accordance with the Government's

obligations under *United States v. Giglio*, 405 U.S. 150, 154 (1972) and the Jencks Act, 18 U.S.C. § 3500. Defendants' motions for grand jury transcripts are therefore **denied.**

C. *Bill of Particulars*

Both Defendants initially requested a bill of particulars pursuant to Federal Rule of Criminal Procedure 7(f), but have withdrawn their motions.

D. *Identification of Informants*

Ragbir requests the disclosure of the names of all informants present at the time the incidents alleged in the indictment took place, the names of all informants used in the Government's investigation, and to disclose the location of the undercover surveillance site. Kosch seeks the disclosure of the names of all informants who were present when any of the acts alleged in the indictment took place and the names of the informants who were present during any incident which the Government intends to prove at trial.

Before the Court may consider compelling the disclosure of a confidential informant's identity, the defendant must satisfy a heavy burden of showing a specific need for such disclosure. *United States v. Jiles*, 658 F.2d 194, 197 (3d Cir. 1981); *See also Rovario v. United States*, 353 U.S. 53, 59 (1957). The Third Circuit has directed district courts to examined the "need, if any, which the defendant has alleged for disclosure," as the burden falls upon the defendant to establish that need. *Jiles*, 658 F.2d at 197.

Appendix D

Defendants have failed to meet their burdens under *Jiles*. The only basis upon which Defendants move to disclose the identity of the informant is their respective belief that the informants may be critical witnesses to events alleged by the Government and that their testimony is relevant and material to the defense. This is not a specific need for the informant's name, but rather speculation and an attempt to obtain pretrial discovery.

Finally, Ragbir demands that he must be given a copy of any photographs that may have been taken from the undercover surveillance site for his own use and investigation for trial and for preparation of his defense. Ragbir, however, cites no law to support his assertion.

The Court **denies** Defendants' motions for disclosure of the names of informants and for disclosure of the location of the undercover surveillance site.

E. *Motion for Pretrial Disclosure of and Preliminary Hearing on 404(b) Material*

Defendants move for immediate disclosure of all evidence of prior crimes and/or offenses which the Government intends to introduce against them and for a preliminary hearing to determine the admissibility of such evidence.

1. *Preliminary Hearing on 404 (b) Material*

Kosch correctly points out that F.R.E. 104 requires that the court make a "preliminary determination" of the admissibility of evidence. When a crime, wrong or act is

offered for admission under Rule 404(b), this preliminary determination requires a finding by the court that there is sufficient evidence for the jury to conclude that the act occurred and that the defendant was the actor. *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

Rule 104 does not mandate, however, that this finding be made at a hearing in advance of trial. In fact, "[q]uestions as to the admissibility of prior bad acts under Rule 404 (b) are properly asserted during trial, not at the pretrial stage." *United States v. Eisenberg*, 773 F. Supp. 662, 685 (D.N.J. 1991). Accordingly, Defendants' motions for a pretrial hearing on the admissibility of Rule 404 (b) evidence is **denied.**

2. *Timely Disclosure*

Prior to the passage of the December 1991 amendments to the Federal Rules of Evidence, Rule 404 did not require pretrial notice of intent to use "other crimes" evidence at trial. *See United States v. Eisenberg*, 773 F. Supp. 662, 685-87 (D.N.J. 1991) ("Questions as to the admissibility of prior bad acts under Rule 404 (b) are properly asserted during trial, not at the pretrial stage.") (citations omitted). Rule 404(b), as amended, requires "reasonable" notice "in advance of trial" unless "the court excuses pretrial notice on good cause shown." The rule is silent as to what constitutes "reasonable" notice and "good cause" or as the form of the notice. *See United States v. Evangelista*, 813 F. Supp. 294, 302 (D.N.J. 1993). Limited case law is available upon the interpretation of what is in fact reasonable. *Id.* In *United States v. Alex*, 791 F. Supp. 723, 729 (N.D. Ill. 1992), the court found that seven days in

advance of trial would be reasonable advance notice. In *United States v. Williams*, 792 F. Supp. 1120, 1133 (S.D. Ind. 1992), the court ruled that ten days in advance of trial was reasonable under the new amendment. In *Evangelista*, the Court, given the fact that the trial occurred five years after the alleged incident, required the government to give notice ten business days prior to trial. *Evangelista*, 813 F. Supp. at 302.

The Court notes that the Government indicated during oral argument that it would immediately disclose any Rule 404(b) evidence that it plans to offer; moreover, any additional Rule 404(b) materials will be provided by no later than October 23, 2000. Defendants' motions for immediate disclosure of all Rule 404 (b) material are **dismissed as moot.**

F. *Rough Notes of Government Agents and Witness*

1. *Preservation of Notes*

Defendants request that the Government be compelled to preserve all rough notes, report drafts, and final reports prepared by any Government agent or witness in connection with the investigation which culminated in the indictment against Defendants.

The Government maintains that it has and will continue to direct its agents to preserve their rough notes, writings and all final reports in connection with this investigation; it contends that it is aware of and will comply with its obligations under *United States v. Vella*, 562 F.2d 275, 276 (3d Cir. 1977) (per curiam) ("the rough interview notes of F.B.I. agents should be kept and produced so that the trial

court can determine whether the notes should be made available to the [defendant] under the rule of Brady . . . or the Jencks Act.") Therefore, Defendants' motions to compel the Government to preserve all rough notes, report drafts, and final reports prepared by any Government agent or witness are **dismissed as moot.**

2. *Disclosure of AUSA's Notes of Proffer Sessions*

Ragbir requests a copy of the notes taken by Assistant United States Attorney ("AUSA") Paula Dow during her meeting with Ragbir and his prior counsel, which took place on September 15, 1999. Ragbir contends that he provided coerced statements at that meeting, which were only recorded in the notes taken by the AUSA.

Fed. R. Crim. P. 16(a)(1)(A) provides, in pertinent part:

> Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: . . . that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; . . . The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent if the government intends to use that statement at trial.

This "rule gives a 'defendant virtually an absolute right' to his own recorded statements 'in the absence of highly unusual circumstances that would otherwise justify a protective order.' " *United States v. Lanoue*, 71 F.3d 966, 974 (1st Cir. 1995) (citing 2 C. Wright, Federal Practice and Procedure § 253, at 46-47 (1982)); *see also United States v. Haldeman*, 559 F.2d 31, 74 n.80 (D.C. Cir. 1976) (en banc) (noting that disclosure of defendant's statements is "practically a matter of right even without a showing of materiality"), *cert. denied*, 431 U.S. 933 (1977); *United States v. Yunis*, 867 F.2d 617, 621-22 (D.C. Cir. 1989).

The Government has failed to address this specific request by Ragbir. Ragbir, however, claims that the Government advised in a letter that a summary of the statements would be provided, but that it has not turned over such information to date. Therefore, the Government is ordered to produce the AUSA's notes of the September 15, 1999 meeting for an in camera review by the Court to determine whether they contain relevant "statements" of Defendant required to be disclosed under Rule 16.

G. *List of Government's Witnesses and Inventory List*

Ragbir requests that the Government furnish him with names of the Government's anticipated witnesses. The Third Circuit has stated that "the discovery rules do not permit the defense to get the names of witnesses." *United States v. Mitchell*, 540 F.2d 1163, 1166 (3d Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977); Addonizio, 451 F.2d at 62 ("in no event is the government required to divulge the identity of its witnesses in a non-capital case.") Therefore, Ragbir's motion for a witness list from the government is **denied.**

Ragbir also seeks an inventory list of all evidence seized during the search of Ragbir's workplace, HFC. The Government states that it has already disclosed to Defendants the items seized during the search of HFC's West Orange office. Specifically, the Government has provided Defendants with copies of large numbers of seized and made available for inspection the originals of all items seized. Having done so, the Government is not required to provide Defendants with an inventory list separately identifying each document produced. Ragbir's motion for an inventory list of all evidence seized during the search of Ragbir's workplace, HFC, is **dismissed as moot.**

H. *Post Arrest Statements Made by Ragbir*

Ragbir contends that the post arrest statements he made to law enforcement at the West Orange Police Department Headquarters and during a meeting at the United States Attorney's Office must be suppressed because they were obtained in violation of his constitutional rights. Kosch argues that post arrest statements made by co-Defendant Ragbir, which inculpate Kosch, must be redacted and that specific instructions be given to the jury that they not use Ragbir's statements against Kosch. Defendants' respective contentions will be addressed in turn.

1. *Suppression*

Ragbir was arrested on July 27, 1999, by members of the West Orange Police Department, a United States Postal Inspector, and a Special Agent of the United States Social

Security Administration. On July 27, 1999, he was interviewed at the West Orange Police Headquarters. He signed a written form waiving his Fifth Amendment rights, gave a full confession, and attested to the accuracy of the statements. On July 28, 1999, he was again interviewed at the West Orange Police Headquarters. He signed another written waiver form, identified a photograph of Kosch, and attested to the accuracy of the identification. Then, on September 9, 1999, he was interviewed at the United States Attorney's Office. He signed another written waiver form and gave a full confession to federal law enforcement agents in the presence of his former attorney.

Ragbir, however, contends that when he interviewed at the police headquarters, his Fifth Amendment rights were violated. He claims that at the July 27th interview, he was given the waiver form to sign only after he was threatened and intimidated into giving a statement, which was elicited after close to 7 hours of interrogation. He also maintains that during those 7 hours of interrogation, he requested an attorney on 2 separate occasions. According to Ragbir, the statements were not accurate; nevertheless, he was told he would not be released if he did not sign it. Ragbir alleges that during the interview on the following day, he was again given the Miranda form to sign with no explanation of his rights until after his statements were coerced. Moreover, he claims that during the meeting at the United States Attorney's Office, he signed a waiver form upon the "grossly ineffective advice

of prior counsel,"[1] and was never given a standard proffer agreement[2] form to sign. Ragbir Br., at 31.

Ragbir therefore requests that all of the statements he made to law enforcement at the West Orange Police Department Headquarters and during the meeting at the United States Attorney's Office be suppressed. Alternatively, Ragbir requests that the Court hold a suppression hearing.

The Third Circuit has recognized that a district court does not have to hold an evidentiary hearing on a motion just because a party requests one. *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996) (citing *United States v. Sophie*, 900 F.2d 1064, 1071 (7th Cir.), *cert. denied*, 498 U.S. 843 (1990)). Rather, the defendant is entitled to a hearing on pretrial motions when his moving papers present a "colorable claim" for relief. *United States v. Brink*, 39 F.3d 419, 424 (3d Cir. 1994) (remanding for hearing where defendant alleged facts that, if true, could violate a defendant's Six Amendment rights); *United States v. Soberon*, 929 F.2d 935, 941 (3d Cir.) (noting that if district court has "reasonable suspicion" of prosecutorial misconduct, then proper course was to hold evidentiary hearing), *cert. denied*, 502 U.S. 818 (1991). "In order to be 'colorable,' a defendant's motion

1. Ragbir maintains that his prior counsel failed to inform him that he had the right to remain silent and actually impressed upon him that he had an obligation to assist law enforcement.

2. The standard proffer agreement, according to Ragbir, contains a promise by the Government not to use the information supplied during the cooperation meeting against Defendant in its case in chief.

must consist of more than mere bald-faced allegations of misconduct." *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996) (citing *United States v. Sophie*, 900 F.2d 1064, 1071 (7th Cir.), *cert. denied*, 498 U.S. 843 (1990)); *see also United States v. Blackwell*, 954 F. Supp. 944, 964 (D.N.J. 1997); *United States v. Richardson*, 764 F.2d 1514, 1527 (8th Cir.) (stating that for an evidentiary hearing to be warranted, the factual allegations "must in every critical respect be sufficiently definite, specific, detailed, and non-conjectural . . ."), *cert. denied*, 474 U.S. 952 (1985).

Moreover, an evidentiary hearing is warranted only where the facts, if proven, would entitle the defendant to relief. *Brink*, 39 F.3d at 424; *United States v. Hamm*, 786 F.2d 804, 807 (7th Cir. 1986); *Richardson*, 764 F.2d at 1527. "There must be issues of fact material to the resolution of the defendant's constitutional claim." *Voigt*, 89 F.3d at 1067 (citing *United States v. Panitz*, 907 F.2d 1267, 1273-74 (1st Cir. 1990) (concluding that lower court's refusal to hold evidentiary hearing on outrageousness claim was proper because material facts were not in dispute)). Moreover, a defendant's "claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of soliciting" the prosecution's case prior to trial. *Nardone v. United States*, 308 U.S. 338, 342 (1939).

Here, the Government has indicated that it is prepared to prove by a preponderance of the evidence that Ragbir was advised of his legal rights and knowingly and voluntarily

waived them.[3] Moreover, because of the absence of any affidavits presented by either party and because Ragbir has alleged facts that, if proven, would entitle him to relief, Ragbir's request for a suppression hearing is **granted.** A suppression hearing was conducted on October 19, 2000; Ragbir's motion to suppress is **denied** for the reasons noted on the record.

2. *Redaction*

a. *Kosch's Motion*

Kosch requests that any post-arrest statements made by his co-Defendant Ragbir that tend to inculpate him must be redacted and subject to a specific limiting instruction.

In *United States v. Bruton*, 391 U.S. 123 (1968), the Court held that a post-arrest statement made by a non-testifying defendant which facially incriminates a co-defendant is inadmissible at their joint trial despite a limiting instruction to the jury because it violates the co-defendant's right to cross-examination. 391 U.S. 123 (1968). Even though a co-defendant's statement is facially incriminating, however,

3. At a suppression hearing, the Government bears the burden of proving by a preponderance of the evidence that Ragbir was advised of his rights and voluntarily elected to waive them. *Lego v. Twomey*, 404 U.S. 477 (1972). The standard for determining the voluntariness of a confession is whether, taking into consideration all the circumstances, the statement is the product of the accused's free and rational choice. The confession must not have been extracted by any sort of threats or violence or by the exertion of any improper influence. *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984).

it may still be admitted if references to the co-defendant are redacted. *Richardson v. Marsh*, 481 U.S. 200, 209 (1987). Redaction is also permitted for oral statements. *See United States v. Gazzara*, 587 F. Supp. 311 (S.D.N.Y. 1984).

The Government states that it is aware of its obligations under *Bruton*; accordingly, it has redacted all direct references to Kosch and has inserted in their place general references to "a person" and "a guy." The Government has also inserted passive voice, where appropriate, to mask further that Kosch is the individual identified in Ragbir's confession. Moreover, the Government has not opposed the request for a limiting instruction. Accordingly, Kosch's motion to redact any post-arrest statements made by his co-Defendant Ragbir that tend to inculpate him and for a specific limiting instruction is **dismissed as moot.**

b. *Raabir's Motion*

Ragbir moves to compel the application of *Bruton* to any statements made by his indicted and unindicted co-conspirators. Ragbir is not aware of any post-arrest statements made by his co-Defendant; the Government confirms that it does not possess any such statements by Kosch that require the application of *Bruton*. The Government, however, recognizes its obligation to apply *Bruton* in the event that any such statement comes to light. Therefore, Ragbir's motion to compel the application of *Bruton* to any statements made by Kosch is **dismissed as moot.**

Appendix D

With respect to Ragbir's request that the Government redact the statements of any unindicted co-conspirators, the Government points out that the protections of *Bruton* only apply to statements made by co-defendants rather than co-conspirators in general. Ragbir has cited no authority to the contrary. Therefore, Ragbir's motion to compel the application of *Bruton* to any statements made by any unindicted co-conspirators is **denied.**

To the extent that the Government seeks to introduce statements of co-conspirators that have not already been disclosed to Defendants, the Government will be required to establish a foundation for admissibility. The Government will have to establish, by a preponderance of the evidence, that a conspiracy exists and that the statements were made in furtherance of the conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987).

I. *Search of Kosch's Office Pursuant to Search Warrant*

After obtaining a search warrant, law enforcement officers conducted a search of 377 Bloomfield Ave., second floor, in Newark, New Jersey. Kosch argues that the search warrant was not based on probable cause, or at least that the scope of the search warrant was not supported by probable cause, and that therefore, the fruits of the search should be suppressed.

As explained in *Gates*, 462 U.S. at 238-39, "the duty of the reviewing court is simply to ensure that the Magistrate had a 'substantial basis for . . . concluding' that probable cause existed." Accordingly, a *de novo* review is not appropriate.

Id. at 236. Furthermore, a magistrate is permitted to draw reasonable inferences as to where evidence is likely to be kept, pursuant to the nature of the evidence and type of offense. *See United States v. Waxman*, 572 F. Supp. 1136, 1146 (E.D. Pa. 1983), *aff'd*, 745 F.2d 49 (3d Cir. 1984).

Upon review of the affidavit submitted in support of the application for the search warrant, the Court finds that there was a substantial basis for the Superior Court Judge to conclude that there was probable cause to believe that evidence of criminal activity was located in Kosch's office in Newark; therefore, the search warrant was not over-broad.

Moreover, as the Government argues, even if the search warrant was improperly issued without probable cause, the executing agents relied in objective good faith on the facially valid warrants, *United States v. Leon*, 468 U.S. 897 (1984); therefore, the fruits of the searches are admissible. Kosch's motion to suppress the fruits of the search of his office is **denied.**

J. *Warrantless Search of Ragbir's Workplace*

Ragbir contends that in violation of his Fourth Amendment right, government agents searched his workplace and seized items from his desk drawers and personal briefcase. He maintains that he did not consent to such a search.

In response, the Government claims that the search was not conducted by law enforcement and therefore, is not a Fourth Amendment violation requiring suppression of the seized evidence. The Government alleges that on July 27,

1999, HFC representatives terminated Ragbir's employment after he was arrested on fraud charges by the West Orange Police Department. Upon his termination, HFC representatives, on their own initiative and without any guidance or direction from law enforcement, immediately took control over Ragbir's workplace, work papers, and personal effects. On July 28, 1999, HFC representatives delivered to West Orange Police Headquarters a series of documents and other information that they considered useful to the on-going criminal investigation.

The Fourth Amendment proscribes only governmental action. "It is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984). Therefore, Ragbir's motion to suppress the fruits of the private warrantless search is **denied.**

K. *Severance*

Both Defendants seek to sever the trial pursuant to Federal Rule of Criminal Procedure 14. Fed. R. Crim. P. 14 states in pertinent part:

> If it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires.

Appendix D

Under Federal Rule of Criminal Procedure 14, the trial court has discretion whether to sever one or more defendants from the others and hold separate trials concerning the same pattern of offenses. *See United States v. Reicherter*, 647 F.2d 397, 400 (3d Cir. 1981). To warrant severance, the defendant must demonstrate "clear and substantial prejudice resulting in a manifestly unfair trial." *United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir.) *cert. denied*, 112 S. Ct. 340 (1991). Mere allegations of prejudice are insufficient; it is not enough simply to show that severance would improve the defendant's chance of acquittal. *Reicherter*, 647 F.2d at 400.

Severance decisions under Rule 14 require the district court to weigh the potential for prejudice to the defendant from joinder against the conservation of judicial resources that joinder will occasion. *Eufrasio*, 935 F.2d at 568. Considerations of judicial economy and tactical disadvantage to the Government resulting from disclosure of its case are highly relevant considerations for trial court in exercising its discretion on motions for severance. *DeLarosa*, 450 F.2d at 1064. The primary consideration is whether the jury can reasonably be expected to compartmentalize the evidence as it relates to the separate charges in the indictment in view of its volume and limited admissibility. *Id.* at 1065; *Eufrasio*, 935 F.2d at 568. The Court should grant a severance under Rule 14 "only if there is a serious risk that a joint trial would compromises a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

Appendix D

1. *Kosch*

Kosch argues that if he is tried along with Ragbir, then there is a danger that the jury will not be able to "compartmentalize the evidence." Further, he asserts that the Government cannot redact Ragbir's statements to exclude references to him and keep the statement coherent pursuant to *Bruton*. Accordingly, he concludes that due to Ragbir's inculpatory statements, a joint trial could deprive him of the right to confront the witnesses against him.

As discussed above in section H.2.a., the Government has redacted all direct references to Kosch and has inserted in their place general references to "a person" and "a guy." The Court finds that redaction is a sufficient remedy in this case to mitigate any potential prejudice to Kosch from the statements of his co-Defendant Ragbir. Moreover, an appropriate limiting instruction will enable the jury to compartmentalize the evidence. *Zafiro*, 506 U.S. at 539 (less drastic measures than severance, such as limiting instructions, often cure risk of prejudice); Richardson, 481 U.S. at 206 (juries are presumed to follow their instructions). Consequently, Kosch's motion for severance is **denied.**

2. *Raabir*

Ragbir claims that severance is necessary because Kosch allegedly would testify at a separate trial and exculpate him. Moreover, Ragbir contends that because of gross disparities in the quantum of evidence available against each Defendant, there is danger of "spillover" from these proofs and that judicial economy would be served by severance.

Appendix D

The Court considers four factors in determining whether to sever on the basis of allegedly exculpatory testimony: (1) the likelihood of a co-defendant testifying; (2) the degree to which such testimony would be exculpatory; (3) the degree to which the testifying co-defendant could be impeached; and (9) judicial economy. *United States v. Boscia*, 573 F.2d 827, 832 (3d Cir.), *cert. denied*, 936 U.S. 911 (1978); *United States v. Gonzalez*, 918 F.2d 1129, 1137 (3d Cir. 1990).

None of these factors counsel in favor of granting Ragbir's motion to sever. He has not demonstrated a likelihood of Kosch testifying at a severed trial. Kosch did not submit an affidavit of willingness to testify or indicate that he would waive his Fifth Amendment privilege if called to testify at a separate trial. *See United States v. Wilson*, 11 F.3d 396, 353 (2d Cir. 1993) (court should consider whether co-defendant will waive Fifth Amendment privilege before granting severance on the grounds that the co-defendant will provide exculpatory testimony). Bare assertions of a willingness to testify at a separate trial, like those Ragbir offers here, are insufficient to warrant severance. *Boscia*, 573 F.2d at 832. Kosch's testimony would also be subject to damaging impeachment. Further, severing Ragbir's trial would not serve the interests of judicial economy because much of the same evidence would be presented at both trials. Moreover, alleged prejudice from "spillover" of evidence and from being associated with co-Defendant Kosch can be cured by appropriate limiting instructions. *See* discussion *supra*; *see also United States v. Borish*, 452 F. Supp. 518, 524 (E.D. Pa. 1978) ("speculation that the jury will not follow the instructions of the Court with respect to compartmentalizing

the evidence does not justify a severance under Rule 14"). Accordingly, after weighing the factors set forth in *Boscia*, Ragbir's motion for a severance is **denied.**

L. *Kosch's Motion for Evidence Obtained by Electronic Surveillance and For an Audibility Hearing*

Kosch seeks production of all wire applications or orders that were submitted to the Court in order to determine whether the Government complied with its obligations under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"). Kosch also requests a hearing pursuant to *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), to determine the admissibility and authenticity of any tape recordings and demands that the Government prove the chain of custody of all evidence sought to be introduced. Finally, Kosch also seeks to compel the Government to produce all finalized transcripts of recorded conversations and other documentary evidence that it intends to use at trial 60 days before the trial date.

The Government maintains that during this investigation, it did not secure any evidence pursuant to Title III or by tape recordings. Kosch's motion for Title III materials and for an audibility hearing is therefore **dismissed as moot.**

M. *Kosch's Motion to Suppress Testimony Obtained in Exchange for Leniency*

Kosch argues that the testimony of all witnesses that was obtained by the Government in exchange for promises of leniency violates 18 U.S.C. § 201(c)(2). That section states:

Appendix D

> Whoever . . . directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or Both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony . . .

18 U.S.C. § 201(c)(2). Therefore, Kosch, relying on *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *rehearing en banc granted and panel opinion vacated*, 144 F.3d 1343 (10th Cir. July 10, 1998) ("*Singleton I*"), moves to suppress all testimony obtained by the Government in exchange for any promises of leniency.

Singleton I, however, is no longer good law. In a 1999 opinion, the Tenth Circuit, sitting en banc, reversed *Singleton* I, rejecting as "patently absurd" the notion that the Government is subject to criminal prosecution pursuant to 18 U.S.C. § 201(c)(2). *United States v. Singleton*, 165 F.3d 1297, 1300 (10th Cir. 1999) (en banc), *cert. denied*, 527 U.S. 1024 (1999) ("*Singleton II*"); *see also United States v. Hunte*, 193 F.3d 173 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 962 (2000). Further, *Singleton I* was vacated by the Tenth Circuit, and its reasoning soundly criticized or ignored by nearly every court to consider the issue. *See, e.g., United States v. Stephenson*, 183 F.3d 110, 118-19 (2d Cir.), *cert. denied*, 120 S. Ct. 517 (1999); *United States v. Lara*, 181 F.3d 183, 197 (1st Cir.), *cert. denied* 120 S. Ct. 432 (1999); *United States v. Allen*,

1998 WL 575264, at *4, n.8 (E.D. Pa. Sept 2, 1998) ("*Singleton*, however, is not the law in this Circuit and is no longer the law in the Tenth Circuit.")

Accordingly, Kosch's motion to suppress testimony of the Government's cooperating witnesses is **denied.**

N. *Ragbir's Motion to Serve Documentary Subpoena*

Ragbir seeks to serve a documentary subpoena upon HFC. The Government does not oppose this motion. Therefore, Ragbir's motion to serve a documentary subpoena upon HFC is **granted.**

O. *Leave to Join in Co-Defendant's Motions*

Defendants seek leave to "adopt and join all such arguments" of his co-defendant. The Court finds this request unnecessary considering that each Defendant individually raised every issue that the other raised and added several more grounds. Moreover, each Defendant's situation may be unique and the Court requires each Defendant to articulate his position separately. Defendants' motions for leave to join in co-Defendant's motions are therefore **denied.**

P. *Government's Cross Motion for Reciprocal Discovery*

The Government cross moves for reciprocal discovery pursuant to Federal Rule of Criminal Procedure 16(b)(1)(A) and (B). Section (b)(1)(A) of this rule mandates reciprocal discovery of tangible objects and documents if the defendant has requested similar discovery from the Government. Section (b)(1)(B) mandates reciprocal discovery of reports

of examinations and tests if the defendant has requested similar discovery from the Government. Because the Government has made discovery available to the Defendant, the Government's motion for reciprocal discovery is **granted.**

III. *Conclusion*

For the foregoing reasons, Defendant's motion for early disclosure of material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and the Jencks Act is **denied;** the Government is ordered to disclose *Giglio* and Jencks materials not later than seven (7) days before the witness in question testifies, at trial; Defendants' motions for grand jury transcripts are **denied;** Defendants' motions for a bill of particulars have been **withdrawn;** Defendants' motions for disclosure of the names of informants and for disclosure of the location of the undercover surveillance site are **denied;** Defendants' motions for a pretrial hearing on the admissibility of Rule 404(b) evidence is **denied.** Defendants' motions for immediate disclosure of all Rule 404(b) material are **dismissed as moot**; if, however, the Government has additional Rule 404 (b) evidence, then it must be disclosed by no later than **October 23, 2000;** Defendants' motions to compel the Government to preserve all rough notes, report drafts, and final reports prepared by any Government agent or witness are **dismissed as moot;** the Court will reserve judgment on Ragbir's motion to disclose the AUSA's notes of the September 15, 1999 meeting until the Court has reviewed in camera those notes to determine whether they contain relevant "statements" of Defendant required to be disclosed under Rule 16; Ragbir's motion for a witness list is **denied.**

Appendix D

Ragbir's motion for an inventory list of all evidence seized during the search of Ragbir's workplace, HFC, is **dismissed as moot;** Ragbir's request for a suppression hearing is **granted.** After conducting the suppression hearing, and for the reasons noted on the record, Ragbir's motion to suppress is **denied.**

Kosch's motion to redact any post-arrest statements made by his co-Defendant Ragbir that tend to inculpate him and for a specific limiting instruction is **dismissed as moot;** Ragbir's motion to compel the application of *Bruton* to any statements made by Kosch is **dismissed as moot;** Ragbir's motion to compel the application of *Bruton* to any statements made by any unindicted co-conspirators is **denied;** Kosch's motion to suppress the fruits of the search of his office is **denied;** Ragbir's motion to suppress the fruits of the private warrantless search is **denied;** Defendants' motions to sever are **denied;** Kosch's motion for Title III materials and for an audibility hearing is **dismissed as moot;** Kosch's motion to suppress testimony of the Government's cooperating witnesses is **denied;** Ragbir's motion to serve a documentary subpoena upon HFC is **granted;** Defendants' motions for leave to join in co-Defendant's motions are **denied;** the Government's motion for reciprocal discovery is **granted.**

SO ORDERED.

Dated: October 24, 2000

s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.